

NO 300 & 304

Office - Supreme Court, U. S.

FILED

AUG 27 1943

CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM—1943.

ADOLF AXELRATH,

Petitioner,

against

SPENCER KELLOGG AND SONS, INC.,

Respondent.

**PETITION FOR WRITS OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF NEW
YORK AND BRIEF IN SUPPORT THEREOF.**

SYDNEY J. SCHWARTZ,
HOWARD F. R. MULLIGAN,
Counsel for Petitioner.

INDEX

	PAGE
Petition for Writs of Certiorari.....	1
Summary and Short Statement of Matter In- volved	2
Jurisdiction	7
The Questions Presented.....	11
Reasons Relied on for the Allowance of the Writs	12
Conclusion	17
Petitioner's Brief in Support of Application for Certiorari	18
Opinions Below	18
Jurisdiction	18
Statement of the Case.....	19
Specification of Errors.....	19
Summary of Argument.....	21
Argument	21
Conclusion	29
Appendix	
Opinion of New York Supreme Court, Special Term	30
Dissenting Opinion of Mr. Justice Close (Appel- late Division)	32
Shipping Act of 1916 as amended, §808.....	32
Shipping Act of 1916 as amended, §824.....	33

CITATIONS

Cases:

Amies v. Wesnofske, 255 N. Y. 156, 163.....	22
Axelrath v. Spencer Kellogg and Sons, Inc., 290 N. Y. Memo. 223.....	1, 10, 18

	PAGE
Axelrath v. Spencer Kellogg and Sons, Inc., 265 App. Div. 874.....	6, 10, 18
Axelrath v. Spencer Kellogg and Sons, Inc., 33 N. Y. Supp. (2d) 94.....	6, 9, 18
Colvin v. Post Mortgage and Land Co., 255 N. Y. 510, 517	22
Davidson v. Stocky, 202 N. Y. 423.....	22
Fuller v. Bradley Constr. Co., 229 N. Y. 605.....	22
Goodman v. Marcol, Inc., 261 N. Y. 188.....	22
Hall v. Shiff, 179 App. Div. 699.....	22
Keeveny v. Charles R. McCormick & Co., 266 Fed. 314	13
The Pilot, 42 Fed. (2d) 290.....	12, 25
Raner v. Goldberg, 244 N. Y. 438.....	25
Shedlinsky v. Budweiser Brewing Co., 163 N. Y. 437	25
Sibbald v. Bethlehem Iron Co., 83 N. Y. 378.....	22
Stern v. Gepo Realty Corp., 289 N. Y. 274.....	22
Tanenbaum v. Boehm, 202 N. Y. 293.....	22
Williams v. Ashner, 152 App. Div. 447.....	22
Zwirn v. Galento, 288 N. Y. 428.....	25

STATUTES

Civil Practice Act (N. Y.) §562.....	10
Rules of Civil Practice (N. Y.) Rule 113.....	2
Judicial Code, §237(b) (Act of Feb. 13, 1925, c. 229, §1, 43 Stat. 937).....	7, 19
Shipping Act of 1916 as amended (U. S. C. Title 46, §808, 52 Stat. 964).....	4-6, 7, 19, 23
Shipping Act of 1916 as amended (U. S. C. Title 46, §824, 39 Stat. 736).....	6, 26, 27

	PAGE
U. S. Code, Title 15, §77(e), May 27, 1933, c. 38, Title I. §5, 48 Stat. 77; June 6, 1943, c. 404, §204, 48 Stat. 906	15
U. S. Code, Title 47, §301, June 19, 1934, c. 652, §301, 48 Stat. 1081	15
U. S. Code, Title 49, §20(a)(2); Feb. 28, 1920, c. 91, §439, 41 Stat. 494.....	14
U. S. Code, Title 49, §306(a); Feb. 4, 1887, c. 104, Part II, §206, as added August 9, 1935, c. 498, 49 Stat. 551 and amended June 29, 1938, c. 811, §8, 52 Stat. 1238, Sept. 18, 1940, c. 722, Title I, §20(e), 54 Stat. 923.....	14
U. S. Code, Title 49, §309(a), Feb. 4, 1887, c. 104, Part II, §209, as added Aug. 9, 1935, c. 498, 49 Stat. 552 and amended June 29, 1938, c. 811, §9, 52 Stat. 1238, Sept. 18, 1940, c. 722, Title I, §16, 54 Stat. 919.....	15
U. S. Code, Title 49, §481(a), June 23, 1938, c. 601, §401, 52 Stat. 987; Reorg. Plan No. IV, §7, eff. June 30, 1940, 5 Fed. Reg. 2421, 54 Stat. 1235...	15
U. S. Code, Title 49, §909(a), Feb. 4, 1887, c. 104, Part III, §309, added Sept. 18, 1940, c. 722, Title II, §201, 54 Stat. 941.....	15
U. S. Code, Title 49, §1010(a), Feb. 4, 1887, c. 104, Part IV, §410, as added May 16, 1942, c. 318, §1, 56 Stat. 291.....	15

MISCELLANEOUS

Restatement of Contracts §301.....	24
6 Williston on Contracts, Rev. Ed., 5019, Note 3....	25

Supreme Court of the United States

OCTOBER TERM—1943.

ADOLF AXELRATH,

Petitioner,

against

SPENCER KELLOGG AND SONS, INC.,

Respondent.

PETITION FOR CERTIORARI.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE
JUSTICES OF THE SUPREME COURT OF THE UNITED
STATES:

Comes now the petitioner, ADOLF AXELRATH, and respectfully petitions this Court for writs of certiorari to review the final judgments of the Court of Appeals of the State of New York entered in this matter on May 27, 1943 (R. 83, 84) (290 N. Y. Memo. 223) one of which (R. 83) affirmed with costs a final judgment of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, entered in the office of the Clerk of Nassau County on December 9, 1942 (R. 80), which in turn affirmed a judgment of the Supreme Court of the State of New York entered in the office of the Clerk of the County of Nassau on April 9, 1942 (R. 5-6), dismissing the complaint (R. 36-8) of petitioner against respondent to recover damages in the amount of Twenty Thousand (\$20,000) Dollars with interest. The other judgment of the Court of Appeals sought to be reviewed (R. 84) affirmed an order of the said Appellate Division

entered on November 23, 1942 (R. 79), which in turn affirmed an order of the Special Term of the Supreme Court of the State of New York entered in the office of the Clerk of the County of Nassau on February 14, 1942 (R. 8), denying petitioner's motion for summary judgment for the relief demanded in the complaint, and made answer in the affirmative to a question certified to the said Court of Appeals by the said Appellate Division, to wit: "Was the order of the Special Term denying plaintiff's motion for summary judgment properly made?"

Summary and Short Statement of the Matter Involved.

The facts involved in this case are not in dispute. The issue is whether an ordinary commercial contract for the sale of a vessel to an alien, subject to the approval of the Maritime Commission at any time prior to delivery which approval the seller undertakes to obtain, the contract being by its specific terms assignable, is a valid binding agreement which may be assigned prior to the expiration of the time for delivery to a citizen, so as to subject the seller to the duty of performance upon proper tender by the assignee as to whom no approval by the Maritime Commission is required. The holding of the Courts below is that such an agreement is a nullity under the provisions of the Shipping Act, and places no obligation of performance upon the seller, upon such tender.

The issue of law presented was raised by motions for summary judgment by petitioner for the relief demanded in the complaint (R. 9) and by respondent for dismissal of the complaint (R. 67) upon affidavits pursuant to Rule 113 of the Rules of Civil Practice of the State of New York under which the Court may grant judgment where no triable issue of fact exists. The action was brought by petitioner, as assignee of one GEORGE P. FERGUSON, to recover Twenty Thousand (\$20,000) Dollars as broker's commissions for services rendered by Ferguson in obtain-

ing a purchaser ready, willing and able to purchase the tank vessel "Spencer Kellogg" owned by the respondent which the respondent offered for sale through Ferguson.

Ferguson was employed under a written contract in the form of a letter dated September 3, 1940, signed by the respondent containing the following paragraph (R. 14):

"If and when the sale is effected approval of the Maritime Commission obtained, full payment is made to us and title transferred to your buyers, then you will be paid a commission of 5% of the purchase price. Otherwise, there is no obligation on our part."

On October 24, 1940, a written contract of sale (R. 15-21) was entered into between respondent and LLOYD BRASILEIRO, a Department of the Republic of Brazil, whereby respondent agreed to sell the said tank vessel to Lloyd Brasileiro for the purchase price of Four Hundred Thousand (\$400,000) Dollars, of which One Hundred Thousand (\$100,000) Dollars was paid upon the signing and delivery of said contract, One Hundred Thousand (\$100,000) Dollars was to be paid upon the delivery of the vessel and the balance of Two Hundred Thousand (\$200,000) Dollars was to be paid in sixteen (16) equal monthly instalments with interest at 5% per annum. The contract provided in paragraph 10 thereof, among other things, as follows (R. 19):

"This agreement and the sale of the vessel are subject in all respects to the condition that the United States Maritime Commission shall approve the sale of the vessel to the buyer and her transfer to Brazilian registry on or before the date of delivery of the vessel, to wit: upon completion of her present commitments and between December 1st and December 15th, 1940, without any condition imposed on either the Buyer or the Seller than the usual conditions that the vessel shall be free of liens and encumbrances at the time of the sale and without restrictions therein of cargo and trading privileges to and from the United

States. The Seller shall promptly apply for such approval by the United States Maritime Commission and use all diligence to obtain same, and the Buyer shall promptly do whatever the Seller may reasonably request in obtaining such approval."

The contract, by its terms, was assignable (paragraph 13, R. 20).

Respondent applied to the Maritime Commission for approval of the proposed sale of the vessel to Lloyd Brasileiro as required by Section 9 of the Shipping Act of 1916 as amended (U. S. C. Title 46, Section 808, 52 Stat. 964), the application bearing even date with the contract and having been signed by respondent as owner and Lloyd Brasileiro as the proposed vendee (R. 52-9). On December 6, 1940, the Maritime Commission denied approval of the sale and transfer of the vessel to Brazilian registry (R. 60). On December 9, 1940, respondent wrote Lloyd Brasileiro notifying it of such denial, purportedly cancelling the contract and enclosing a check for refund of the down payment of One Hundred Thousand (\$100,000) Dollars (R. 61). On December 10, 1940, Lloyd Brasileiro, through its counsel, acknowledged receipt of the letter of December 9, 1940, requested information as to the grounds for the Maritime Commission's action and as to the chronology of the proceedings, and rejected the concellation of the contract inasmuch as the time for delivery had not expired and returned the check for One Hundred Thonsand (\$100,000) Dollars (R. 62-3).

On December 13th respondent again forwarded the check for One Hundred Thousand (\$100,000) Dollars to Lloyd Brasileiro and stated that in respondent's view the contract had been cancelled and refused to do anything further to obtain approval or to furnish the information requested by Lloyd Brasileiro (R. 64). On December 14, 1940, Lloyd Brasileiro assigned all of its right, title and interest in the contract to Moore-McCormack Lines, Inc.; a

Deleware corporation (R. 22-4), and on December 16, 1940, Lloyd Brasileiro gave notice of said assignment to respondent, returning with such notice the check for One Hundred Thousand (\$100,000) Dollars and refusing to recognize respondent's declaration of the cancellation of the contract (R. 25). December 15, 1940, the last day for performance under the contract, was a Sunday and it is admitted by the pleadings below that the last day for performance accordingly fell on the following day, December 16, 1940 (R. 37, 39). On December 16, 1940, Moore-McCormack Lines, Inc., tendered performance of the contract to respondent and offered to pay the full balance of the purchase price in cash on delivery or at the preference of respondent to furnish notes in accordance with the terms of the contract secured by a letter of credit of the Chase National Bank of the City of New York in respondent's favor (R. 26). Respondent refused to make delivery writing in a letter of December 17th that inasmuch as the Maritime Commission under date of December 6th had denied approval of the sale the contract on that day became null and void and respondent under such conditions refused to recognize the assignment (R. 27-8). Further correspondence between the parties followed in which their positions were reiterated (R. 30-34, 65-6). Respondent thereafter, on due demand, refused to make payment of broker's commissions (R. 38, 39) contending that under Section 9 of the Shipping Act of 1916 as amended by the Act of June 23, 1938 (Title 46, Section 808 of the U. S. C. A.) it was unlawful to sell the vessel without the approval of the Maritime Commission and that upon the denial of approval, the contract was at an end by virtue of the provisions of the statute (R. 40-3).

The Statute (52 Stat. 964) (set out in the appendix) requires approval of the Maritime Commission of any sale of a vessel by a citizen of the United States to an alien or to the transfer to foreign registry of any such

vessel. It requires no approval of the sale of any vessel to an American national where no change to foreign registry is requested. The statute further empowers the Commission to reconsider its orders and to amend, reverse or modify them (Title 46, U. S. C. Section 824, 39 Stat. 736).

In petitioner's view, a contract to sell a vessel of American registry to an alien, expressly subject to approval by the Maritime Commission is a valid commercial agreement imposing mutual obligations of performance on the contracting parties particularly where, as here, the seller expressly undertook to exert all diligence in obtaining such approval and the buyer agreed to do whatever the seller might reasonably request to obtain such approval (R. 19). Such a commercial obligation may be assigned, where, as here, the contract is by its specific terms assignable (R. 20). And where, as here, the contract is assigned prior to default on the part of the buyer, and before the expiration of the time for performance, and while the Maritime Commission still has power to give its approval on rehearing, a duty is imposed on the seller to perform in relation to the assignee. Where, as here, the assignee is an American corporation, requiring no approval of the Maritime Commission to the transfer of the vessel, the duty of performance by the buyer is absolute upon tender of performance by the assignee. In the words of the dissenting opinion of Mr. Justice (now Presiding Justice) Close of the Appellate Division (R. 81):

"The contract was assigned prior to the law day to a purchaser to whom the condition precedent had no application."

The New York Supreme Court upon denying petitioner's motion for summary judgment at Special Term stated (R. 74):

"The defendant's argument on this motion is that there was no contract without the Commission's ap-

proval and if there was no contract that there could be no assignment. With this contention, I agree."

This is the kernel of the controversy which can be resolved only by the construction to be given to the Shipping Act. Petitioner contends that having obtained a purchaser, to wit: Moore-McCormack Lines, Inc., a Delaware corporation, not an alien, to which the prohibition of the Shipping Act did not apply, which said purchaser was ready, willing and able to take delivery of the vessel and to make payment therefor in accordance with the terms of the contract, and within the period prescribed in the contract for performance, he has earned the brokerage commissions agreed by respondent to be paid; and that all of the conditions of said agreement have been met except such as were not performed because of respondent's wilful default and refusal to deliver to Moore-McCormack Lines, Inc.

Jurisdiction.

Jurisdiction to grant the writs prayed for by this petition is found in Section 237 (b) of the Judicial Code (Act of February 13, 1925, c. 229, Section 1, 43 Stat. 937) inasmuch as the question presented involves a right, privilege and immunity set up and claimed by the respondent under a statute of the United States, to wit: Section 9 of the Shipping Act of 1916 as amended by the Act of June 23, 1938 (Title 46, U. S. C. Section 808, 52 Stat. 964). If the construction of the Shipping Act arrived at by the Courts below is sustained the judgments sought to be reviewed were properly made. On the other hand, if the construction placed upon the Shipping Act by the Courts below is not sustained and the construction of that statute contended for by petitioner is adopted, the judgments sought to be reviewed were error in that the contract upon which petitioner seeks

recovery was fully performed by petitioner's assignor and performance of the condition of obtaining approval of the Maritime Commission to the sale of the vessel to Lloyd Brasileiro was excused upon the assignment of the contract to Moore-McCormack Lines, Inc. which required no approval of the Maritime Commission to purchase the vessel and take delivery thereof.

The questions involved are substantial in that if petitioner's construction of the Statute is adopted petitioner will become entitled to judgment against respondent in the amount of \$20,000 with interest and costs, whereas if the construction of the Courts below embodied in the judgments sought to be reviewed is adopted petitioner will not become entitled to such judgment.

The Federal question raised in this matter and sought to be presented to this Court for review was first raised by the pleading in the defendant's answer of a so-called "first, separate and complete defense" (R. 40-3) in which the full portion of the Shipping Act, the construction of which is in issue, was quoted (R. 41-2). Respondent in said defense further pleaded that pursuant to the provisions of the said statute and of the contract, application was made to the Maritime Commission for approval of the sale of the "Spencer Kellogg" to Lloyd Brasileiro, permission was refused and upon the refusal of such permission the contract of sale was at an end (R. 42-3). Concluding said defense is the further allegation of paragraph Eighth of said defense as follows (R. 43):

"EIGHTH: The contract having been terminated by reason of the disapproval of the sale by the United States Maritime Commission and the agreement for the payment of commission to said George P. Ferguson having expressly provided that he was not to receive a commission until sale was effected and title passed, which did not occur, no commission was earned by said George P. Ferguson and there is nothing due and owing from the defendant to said George P. Ferguson."

The Federal question was passed on by the Justice at Special Term in his opinion as follows (R. 74-5):

"The defendant's argument on this motion is that there was no contract without the Commission's approval and if there was no contract that there could be no assignment. With this contention, I agree. By Section 808, Title 46, of the U. S. Code Annotated, it is provided, in part:

" * * * it shall be unlawful without the approval of the United States Maritime Commission, to sell * * * or agree to sell * * * to any person not a citizen of the United States * * * any vessel * * * owned in whole or in part by a citizen of the United States * * *."

Violations, according to that Section, will result not alone in the forfeiture of the vessel but in punishment of the violator by the imposition of a fine of \$5,000, imprisonment of not more than five years, or both.

The parties to the contemplated sale in this case apparently recognized Section 808 by conditioning their agreement upon the Commission's approval. Had they not done so, the agreement would have been void and unenforceable. Nevertheless, for it is well settled that a contract or sale directly prohibited by statute is void. (*Sturm v. Truby*, 245 App. Div. 357; *Restatement of the Law of Contracts*, Section 580; *Williston on Contracts*, Revised Edition, Section 1763.) But, having expressly agreed to the condition, the conclusion that the contract was ineffective is strengthened and reinforced, for a precedent condition must be performed or happen before a duty of performance arises or before the agreement of the parties in this case became a valid and binding contract. (See *Williston on Contracts*, Revised Edition, Section 666-A.) 'Non-performance of a condition precedent must * * * annul the contract in toto * * *' (*Del Monte Dress Co., Inc. v. Royal Indemnity Co.*, 154 Misc. 751). After the defendant's application for approval was denied, it was under no obligation to apply again. It rightfully treated the

contract as non-existent and returned the down payment. Ferguson, therefore, had not earned any commission."

The question was raised in the Appellate Division by notice of appeal from the orders of the Special Term and the judgment of the Special Term dismissing the complaint which said notices of appeal specified that the appeals were taken from each and every part of said judgment and orders as well as the whole of each thereof (R. 2-4). It is not the practice in the State of New York to file assignments of error or to petition for allowance of appeal. An appeal is taken by the service and filing of a notice of appeal specifying the order or judgment appealed from or the particular portions thereof sought to be reviewed if the entire judgment record is not brought up for review. Upon such appeal the entire judgment or order is brought up for review unless the notice of appeal limits the appeal to a specific part thereof (Civil Practice Act Section 562). The question was raised on appeal to the Court of Appeals by specification in the notice of appeal to that Court that appeal was taken from so much of the order of the Appellate Division entered November 23, 1942, pursuant to leave granted by said Appellate Division, as affirmed the order of the Special Term of the Supreme Court denying plaintiff's motion for summary judgment for the relief demanded in the complaint (R. 78) and that the appeal was further taken from each and every part of the judgment of affirmance of the said Appellate Division entered in the office of the Clerk of the County of Nassau on April 9, 1942 (R. 80). The question was briefed in the briefs of both petitioner and respondent submitted to the Appellate Division and to the Court of Appeals as is quite evident from the reports of the decisions of those Courts (290 N. Y. Memo 223; 265 App. Div. 874). Appended hereto is a complete copy of the opinion of the Special Term of the Supreme Court denying petitioner's motion for summary judgment.

ment for the relief demanded in the complaint and a copy of the dissenting opinion of Mr. Justice (now presiding Justice) Frederick P. Close of the Appellate Division.

The Questions Presented.

The record presents the following Federal questions:

1. Is a contract to sell a vessel by an American citizen to an alien valid under the Shipping Act so that it may be assigned to a citizen of the United States prior to the expiration of the time for performance to vest in the assignee the right of tendering payment and demanding performance from the seller, where the contract by its express terms is subject to the approval of the Maritime Commission and is assignable and no violation of law is contemplated or necessarily incident to performance?

2. Did the rights and liabilities under the contract of sale survive denial of approval of the sale of the vessel to a foreign national so that it continued to be a valid subsisting and assignable obligation where rehearing before the Maritime Commission of the application for approval might have been applied for within the time for performance prescribed by the contract and the Commission's objections satisfied, where, as in the case at bar, the seller expressly undertook to exercise all diligence to obtain such approval and the buyer undertook to do whatever the seller might reasonably request to obtain such approval.

3. Was the agreement of sale whereunder the seller undertook to exercise all diligence to obtain the approval of the Maritime Commission and the buyer undertook to do whatever the seller might reasonably request to obtain such approval, a valid undertaking by the seller to exercise all diligence to obtain such approval, which obligation

subsisted so long as such approval might be obtained by initial application, rehearing or otherwise during the period for performance prescribed by the contract; and, if so, was this obligation assignable prior to the expiration of the time for performance so as to require performance of the seller upon demand and tender of performance by the assignee in accordance with the terms of the contract.

Reasons Relied on for the Allowance of the Writs.

The reasons relied on by petitioner for the allowance of the writs of certiorari herein prayed for are that of the Court of Appeals of the State of New York by the judgments sought to be reviewed, has decided a Federal question of substance not heretofore determined by this Court. Careful examination of the reported authorities by counsel for petitioner has disclosed only one case decided in a Federal Court construing the Shipping Act insofar as it is involved in the issue presented in this case. That was a decision of the United States District Court, District of Maine, S. D., reported under the name of *The Pilot*, 42 Fed. (2d), 290, which case was not appealed to the Circuit Court or to this Court. In that case a libel had been brought against the vessel for violation of the Shipping Act in "selling the boat to a person not a citizen of the United States without first obtaining the approval of the Shipping Board". The proceeding was brought to declare a forfeiture of the vessel under the Act which provides for such forfeiture in the event of violation. The Court dismissed the libel, stating at page 290:

"There was evidently time at Lubec to obtain permission of the Board before the actual sale was effected, and no sale could be completed until an actual delivery of the boat. I think the claimant clearly had an opportunity to get the Board's permission before the boat left American waters."

No other Federal case has been disclosed by the research of petitioner's counsel nor has any Federal case construing the Act been cited in any of the briefs of respondent's counsel below or in the opinion of the Special Term which is the only opinion handed down by the Courts below in support of the judgments. Respondent's counsel did cite in its brief to the Court of Appeals, the case of *Keeveny v. Charles R. McCormick & Co.*, 266 Fed. 314 (C. C. A. 2), in which suit was brought on a first cause of action to recover a brokerage commission in connection with a contract for the sale of a vessel requiring the approval of the then United States Shipping Board where the contract itself does not appear to have been assignable and made no mention of the fact that it was subject to the approval of the Shipping Board and where the Shipping Board refused to permit the sale and nothing was thereafter done to tender performance by the purchaser or by any assignee of the purchaser who could perform without consent of the Shipping Board. In other words, in that case the contract of sale simply could not be performed in any legal manner whereas in the case at bar the contract could have been performed legally and would have been performed except for respondent's refusal to accept the tender of performance by the assignee, Moore-McCormack Lines, Inc.

The issue involved in the case at bar, which is sought to be subjected to the review of this court, is one that has become of greater significance in recent years with the multiplication of administrative boards exercising supervisory powers over the transaction of ordinary commercial business affairs which, due to the complexity of our present economic system, are vested with a public interest. This case does not present the question of the power of the Congress or the prudence of Congress in creating such Commissions and vesting in them the supervisory power referred to. There is not the slightest

doubt that the power exists and that its exercise is necessary to the well-ordered conduct of the particular fields of interstate commerce over which the various Commissions have been charged with supervision. The question posed, however, is the very important one of whether the requirement of the approval of such Federal Commissions to the performance of the various acts which are prohibited in the absence of such approval, has created a legal situation whereby businessmen in the ordinary transaction of commerce cannot, however much they will it, enter into a binding commercial contract, to obtain such approval, and subject to obtaining such approval or the elimination of the need therefore (as in the case at bar), to perform an ordinary commercial transaction. Put another way, the question is whether business men can make binding agreements to abide by Federal laws requiring approval by Commissions of certain types of commercial transactions, and are they subject to the usual obligations of breach of contract where they fail to perform, where performance contemplates and requires no violation of law.

Typical, but by no means exclusive, of the Acts requiring the consent of Federal administrative boards to the performance of ordinary commercial contracts are the following:

The Act prohibiting the issuing by any carrier of securities without prior authority by order of the Interstate Commerce Commission (Title 49, U. S. C. Section 20 (a) (2); Feb. 28, 1920, c. 91, Section 439, 41 Stat. 494).

The Act prohibiting the interstate or foreign operation of motor carriers unless a certificate of public convenience and necessity be issued by the Interstate Commerce Commission (Title 49, U. S. C. Section 306(a) Feb. 4, 1887, c. 104, Part II, § 206 as added Aug. 9, 1935, c. 498, 49 Stat. 551 and amended June 29, 1938, c. 811 § 8, 52 Stat. 1238, Sept. 18, 1940, c. 722, Title I § 20(e), 54 Stat. 923).

The Act prohibiting the operation in interstate or foreign commerce of contract carriers by motor vehicle unless there is in force a permit issued by the Interstate Commerce Commission (Title 49, U. S. C. Sec. 309(a) Feb. 4, 1887, c. 104, Part II, § 209, as added Aug. 9, 1935, c. 498, 49 Stat. 552 and amended June 29, 1938, c. 811, § 9, 52 Stat. 1238, Sept. 18, 1940, c. 722, Title I, § 16, 54 Stat. 919).

The Act prohibiting air transportation by carriers in the absence of a certificate of public conveyance and necessity issued by the Civil Aeronautics Board (Title 49 U. S. C., Section 481(a), June 23, 1938, c. 601 § 401, 52 Stat. 987; Reorg. Plan No. IV § 7 eff. June 30, 1940, 5 Fed. Reg. 2421, 54 Stat. 1235).

The Act prohibiting the operation in interstate or foreign commerce of common carriers by water in the absence of the issuance of a certificate of public convenience and necessity by the Interstate Commerce Commission (Title 49, U. S. C. Section 909(a), Feb. 4, 1887, c. 104 Part III § 309, added Sept. 18, 1940, c. 722, Title II § 201, 54 Stat. 941).

The Act prohibiting the operation in interstate or foreign commerce of freight forwarders in the absence of the issuance of permits by the Interstate Commerce Commission (Title 49, U. S. C. Section 1010(a), Feb. 4, 1887, c. 104, Part IV § 410, as added May 16, 1942, c. 318, § 1, 56 Stat. 291).

The Act prohibiting the use or operation of radio apparatus except under license of the Federal Communications Commission (Title 47, U. S. C. Section 301, June 19, 1934, c. 652 § 301, 48 Stat. 1081).

The Act prohibiting the use of the mails or of instruments of transportation or communication in interstate commerce for the sale or offer to buy any unregistered security where registration is required (Title 15, U. S. C. Section 77(e) May 27, 1933, c. 38, Title I § 5, 48 Stat. 77; June 6, 1943, c. 404 § 204, 48 Stat. 906).

In all of these cases it is obvious that businessmen in good faith enter into contracts to engage in one or more of the prohibited acts subject, of course, to the approval of the Commission having supervisory jurisdiction. In

the making of such contracts there is often, if not invariably, included an undertaking on the part of one or more of the contracting parties to exercise diligence in making the necessary efforts to obtain such approval. According to the theory and principle evolved in this case by the Courts below such agreements are worthless scraps of paper imposing no duty of performance nor any legal obligation upon any of the contracting parties to perform in any respect whatever. Paraphrasing the summary of respondent's argument, included and approved in the opinion of the Special Term (R. 74) "There is no contract without the Commission's approval". The Court below said without a contract there could be no assignment. It is not a step further to point out that without a contract there could be no obligation to perform, even to the extent of applying for permission. If this is the law and the proper construction to be placed upon Federal statutes of general application and of daily increasing importance by reason of the vast field of commerce involved, it is submitted that such construction should have the approval of an authoritative decision of this Court. It is difficult to believe that this Court would sanction such a construction of a Federal statute, the effect of which would be to foster complete irresponsibility and lawlessness in commercial obligations requiring approval by Federal Commissions.

Under these circumstances it seems that this case presents a question decided by the highest Court of the State of New York in a way greatly restricting the freedom of interstate commerce. In the absence of a decision by this Court covering the principle involved, it is submitted that certiorari to review should be granted.

Conclusion.

WHEREFORE, petitioner prays that writs of certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Appeals of the State of New York commanding that Court to certify and to send to this Court on a designated day for its review and determination a full and complete transcript of the record and all proceedings in the action entitled "Adolf Axelrath, plaintiff-appellant, against Spencer Kellogg and Sons, Inc., defendant-respondent", Calendar #100, April 1943 Term, and that said judgments of the Court of Appeals of the State of New York and the said judgment and order of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, and the said judgment and orders of the Special Term of the Supreme Court of the State of New York, County of Nassau, may be reversed by this Honorable Court and that petitioner may have judgment for the relief demanded in the complaint and for such other and further relief as in the premises may be meet and proper.

Dated, New York, August 20, 1943.

ADOLF AXELRATH,
Plaintiff-Appellant.

By SYDNEY J. SCHWARTZ and
HOWARD F. R. MULLIGAN,
Counsel.